

ORIGINAL

Federal Communications Commission

To: Chief, Mass Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

WILLIS BROADCASTING CORPORATION (“Willis”) by Counsel, hereby respectfully submits its Opposition to the Petition for Reconsideration (“Petition”) filed by Donald B. Brady (“Brady”) in the above-captioned proceeding on December 9, 1994. Willis requests that the Commission deny Brady’s Petition, and affirm the staff’s action in allocating Channel 265C2 to Utica, Mississippi. In support thereof, Willis states the following:

1. On June 16, 1993, in response to a Petition for Rule Making filed by St. Pe' Broadcasting ("St. Pe'") the Commission released a *Notice of Proposed Rule Making and Order to Show Cause*, 8 FCC Rcd 4080 (1993), ("*NPRM*") in the above-captioned proceeding to substitute Channel 265C3 at Utica, Mississippi, and modify the license for Station WJXN (FM) to specify operation on the higher class channel. To accommodate the upgrade, St. Pe' also requested the substitution of Channel 267A for Channel 266A at Vicksburg, Mississippi, and modification of the license for Station WBBV-FM and substitution of Channel

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235A for Channel 265C3 at Hazlehurst, Mississippi, and modification of the license for Station WMDC-FM. The *NPRM* set August 9, 1993 as the date for filing of Comments in this proceeding. Willis, the assignee of Station WJXN (FM), timely filed Comments in support of the proposed substitutions.¹ St. Pe' timely filed a Counterproposal for substitution of Channel 265C2, rather than Channel 265C3 at Utica, and pointed out the Commission's error in its *NPRM* inviting expressions of interest in Channel 265C3, since St. Pe's initial proposal, and its subsequent counterproposal, constituted an incompatible channel swap, thus protecting the proposed substitution from competing expressions of interest. Donald F. Brady untimely filed an "Expression of Interest" on August 10, 1993; he attempted to deliver a copy of his Expression of Interest to the Commission *via* facsimile transmission on August 9, 1993. Later, on October 16, 1993, Brady filed a Contingent Motion for Leave to accept his late-filed Expression of Interest, citing the reasons why Brady was unable to file his Comments on the due date.²

2. On November 3, 1994, the Commission released its *Report and Order*, DA 94-1201, in the above-captioned proceeding. The Commission noted its error in inviting comments expressing interest in the use of Channel 265C3, as the proposed upgrade and substitution constituted an incompatible channel swap, and that, as a consequence, Brady's Expression of Interest was unacceptable. The Commission also noted that Brady's Comments would have been unacceptable in any event, since they were not filed on or before the due date, and since they were not filed in accordance with §1.420(a) and (c) of the Commission's rules.

¹Willis is now the Licensee of Station WJXN(FM), pursuant to the Commission's grant of the application for assignment of WJXN (FM) on October 21, 1993.

²A Request for Extraordinary Relief was also filed by Crossroads Communications, Inc., in connection with a separate Rule Making proceeding.

Accordingly, the FCC granted St. Pe's Counterproposal and substituted Channel 265C2 at Utica, Mississippi, as well as the other substitutions requested by St. Pe'.

II. Brady's Argument that the NPRM is a 'Final Order' is Erroneous

3. Brady argues that staff was precluded from acknowledging its error in its original *NPRM* regarding whether expressions of interest could be filed in connection with the proposal to substitute Channel 265C3 at Utica, Mississippi, because the *NPRM* was a "Final Order" whose terms cannot be changed by the Commission's staff. Brady's argument is without merit. The *NPRM* was not a "Final Order" which would have negated St. Pe's proposal for an incompatible channel swap, or required the Commission to accept competing expressions of interest in the proposed upgraded channel. There was nothing in the *NPRM* to suggest that the Commission actively disagreed with St. Pe's proposal of an incompatible channel swap, and there was nothing to preclude St. Pe' from correcting the Commission's error, or proposing the incompatible channel swap in its timely-filed Comments and Counterproposal.

4. Brady's argument that a Notice of Proposed Rule Making constitutes a "Final Order" is untenable in view of the nature of Rule Making proceedings in general, and especially in view of the Commission's conclusion in this proceeding that its original *NPRM* was in error. The very purpose of rule making proceedings is to allow interested parties to submit their views, which may cause the FCC to modify the positions initially proposed in the *NPRM*. It is very common for the Commission to adopt suggestions made on Comments which are completely outside the original proposals made in an *NPRM*, nor is it uncommon for the Commission not to adopt a proposal it originally made in an *NPRM*, if that proposal

is universally rejected in responsive comments. It is ludicrous to suggest that any position proposed by the Commission in an NPRM must be viewed as a hard and fast position which cannot be changed except on appeal. As the title suggests, the Commission publishes a "Notice of *Proposed* Rule Making" which *initiates*, rather than terminates a proceeding. The FCC *invites* comments and suggestions from interested parties. In no way does an NPRM meet the definition of a 'Final Order', as that term is defined in *Bethesda-Chevy Chase Broadcasters, Inc. v. FCC*, 385 F.2d 967 (D.C. Cir. 1967) or elsewhere. Thus, if the Commission, in the first instance, overlooked the fact that the proposal involved an incompatible channel swap, the parties were entitled to bring this fact to the Commission's attention in their timely-filed Comments. St. Pe' did just that in its timely filed Comments and Counterproposal. The Commission is entitled to take note of St. Pe's Comments and argument, and accordingly, is not precluded from changing its initial position regarding modification of the WJXN (FM) license to allow for the requested upgrade.

III. Brady's Petition for Reconsideration Is Repetitious.

5. Section 1.429, as well as §1.106 of the Commission's Rules provide for Reconsideration of Commission actions where new facts are presented. Commission policy does not favor reconsideration of Commission action where the Petition for Reconsideration merely rehashes the facts and arguments presented previously. Such reconsideration is a waste of the Commission's resources. *Cf. Practice and Procedure*, 46 RR 2d 524 (1979). Moreover, the Commission will not entertain petitions for reconsideration consisting of facts and arguments previously available and presented to the Commission, and will reconsider its actions where

there is “new” evidence *only* where such evidence is a result of changed circumstances, where the evidence could not previously have been discovered through due diligence, or where there is a sufficient public interest reason for doing so. *RCA American Communications, Inc.*, 64 RR 2d 1119 (1988). Brady has presented no new facts, and no new arguments in his Petition.³ Denial of Reconsideration is therefore fully warranted.

IV. The Staff Was Justified in Rejecting Brady’s Untimely-Filed Comments

6. Brady argues that the Staff erred in refusing to accept his “Expression of Interest” as timely-filed. While Brady acknowledges that the cut-off dates in the *NPRM* “fix the participation rights of all interested parties”⁴, he protests the Commission’s refusal to accept his filing *via* facsimile on August 9, 1993, or his late-filed comments on August 10, 1993. However, a facsimile transmission of a pleading does not, under the Commission’s Rules, constitute a formal *filing*. The Commission’s Rules currently provide for filing of documents with facsimile *signatures*⁵ but there are no procedures or provisions for the filing of an entire document by facsimile, or rules governing whether such documents are deemed to be timely-filed with the Secretary’s Office if received at a fax machine elsewhere in the Commission. Moreover, the Rules regarding the specifications for pleadings and for the number of copies of pleadings to be filed

³Although Brady’s “final order” argument (Brady Petition, pp. 3-5) was not specifically addressed in the *Report and Order*, since it was presented in unauthorized “Supplemental Comments” which were not considered by the Staff, it nevertheless was presented to the Commission, and was before it, and cannot be considered to be “new”.

⁴Petition, p. 5, ¶ 5.

⁵See §1.52 of the Commission’s Rules.

in differing circumstances⁶ preclude the possibility of facsimile filings, since the paper size, type, and number of copies would be difficult, if not impossible, to control by facsimile. In any event, it does not appear that the facsimile sent by Brady on August 9, 1993 reached the Secretary's office at the FCC until August 10, 1993 – again a result of the lack of formal procedures regarding filing by facsimile at the FCC.

7. Nor is Brady's reliance upon his alternative attempts to have his Comments delivered to the FCC by same-day courier persuasive; as pointed out by St. Pe' in its Opposition to Brady's later-filed Contingent Motion for Leave to accept his previously-filed comments,⁷ the plane service utilized by Brady was not scheduled to arrive in Washington D.C. until 6:40 p.m. on August 9, 1993, over an hour *after* the Commission closes for the day.⁸ Although Brady claimed "emergency circumstances" consisting of a fire at his consulting engineer's residence, and the discovery, on August 9, 1993, that his Comments had not been prepared for submission, Brady never supported those allegations with any documentation. Moreover, there was nothing to prevent Brady from prior checks on the status of his Comments to ensure timely filing, especially where filing over distances by courier or mail is contemplated, as was the case here. It was incumbent on Brady to ensure that his Comments arrived on August 9, 1993; his

⁶See 47 CFR §§1.49, 1.51, and 1.420.

⁷Filed by Brady on October 12, 1993, more than two months after his Comments were filed at the FCC.

⁸Brady could have utilized any of several dozen law firms or courier services located in the Washington D.C. area as destinations for his Comments, for filing of the appropriate number of documents with his facsimile signature with better results; however, his obvious lack of sophistication does not excuse his tardiness in filing, when he was obviously aware of the deadline prior to the cut-off deadline.

“emergency circumstances” could have been avoided by more careful planning or better supervision of his consulting engineer’s efforts.

8. Brady also claims that Commission precedent requires acceptance of his late-filed Comments, citing *Julian, California*, 102 FCC 2d 27 (1985) in support. In fact, that case merely rules that the Commission may *consider* motions to receive late-filed Comments on an *ad hoc* basis, and may grant and receive late-filed Comments where it finds it in the public interest to do so. The Commission retains the discretion to refuse to entertain such late-filed Comments, as it did in this proceeding.

9. Brady also argues that the Staff’s ruling that Brady’s Comments were not timely filed is plain error, in view of the fact that no rule mandates where at the Commission pleadings are to be received. While it is true that §1.420 does not specify where pleadings are to be received,⁹ *specific instructions* are given, as a rule, and were given in this proceeding, in the *NPRM* itself.¹⁰ However, it is also significant, as noted above, that the Commission’s rules specifically contemplate the filing of multiple copies of a pleading, and specifically allow for facsimile signatures, but nowhere provide for acceptance of filings made by facsimile. If Brady risked the use of an unsanctioned filing method, and did not simultaneously provide good reason for acceptance of the pleading under

⁹Brady argues that Section 1.420 of the Rules only states that Comments and Replies are to be filed “with the Commission.” Brady Petition, p. 8, ¶12. However, §1.419, which applies to *all* rule makings including FM Table of Allotments, sets forth the distribution of the copies which indicates that the *Secretary* is to be provided with the Original and one copy.

¹⁰See *NPRM*, APPENDIX, paragraphs 4 and 5: paragraph 4 specifies that “[c]omments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.” Brady thus had actual notice of the filing requirements in this very proceeding, by the very document that he now claims has the weight of a “*final order*.” He did not comply with the procedures plainly stated therein, and should not be heard to complain now.

the novel method employed, then Brady must bear the consequences of his choice.

10. In short, Brady's Comments fell short of the FCC's specifications in several respects: (1) they did not reach the FCC until the day after the cut-off deadline; (2) only a single copy reached the Commission on August 9, 1993; and (3) that single copy did not reach the Secretary's office until August 10, 1993. The Commission is not *required* to accept untimely-filed pleadings, or pleadings filed in irregular fashion. It was well within the FCC's discretion to reject Brady's expression of interest.

V. Brady's Arguments on Timeliness are Irrelevant

11. Moreover, Brady's arguments regarding the timeliness of his filings are of no import. In view of the Commission's recognition of its own oversight in its initial *NPRM*, and the fact that no expressions of interest *could* be entertained *in any event*, Brady's arguments regarding the timeliness of Brady's comments are moot. Even had Brady timely filed an expression of interest, it would have been unacceptable under the circumstances of original proposal.

VI. Conclusion

12. In summary, Brady's argument that the *NPRM* requires the Commission to accept his Comments expressing an interest in the channel are unprecedented, and simply incorrect. Brady's expression of interest could not have been entertained by the Staff, even had it been timely filed. As demonstrated above, Brady did not timely file his Comments in this proceeding, and his citations of extraordinary circumstances do not meet the criteria set by the Commission for unforeseeable and unavoidable circumstances warranting acceptance of untimely filings. The Staff's action rejecting Brady's comments as untimely and,

in any event, irrelevant was correct, and its substitution of Channel 265C2 at Utica should be affirmed.

WHEREFORE, the foregoing considered, Willis respectfully requests that the Commission DENY Brady's Petition for Reconsideration, and AFFIRM its action in the above-captioned proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

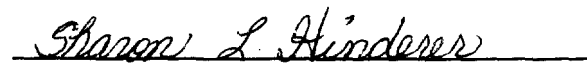
I, Sharon L. Hinderer of the Law Firm of **Putbrese & Hunsaker**, hereby certify that I have on this 22nd day of December, 1994, sent, by United States Mail, Postage prepaid, copies of the foregoing, "**Opposition To Petition for Reconsideration**" to the following:

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